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## THREE YEARS LATER: STATE COURT INTERPRETATIONS OF THE ATTORNEY'S RIGHT TO ADVERTISE AND THE PUBLIC'S RIGHT TO INFORMATION

*In re Koffler*<sup>1</sup>

In August 1977, New York attorney William Henry Harrison placed an advertisement in the real estate section of a local daily newspaper, stating that his legal fee for real estate closings was \$235. Later in the month, Harrison and his law partner Alfred S. Koffler mailed letters directly to approximately 7,500 homeowners and several hundred real estate brokers, reproducing the advertisement. The homeowners were told that they could be represented for \$195, a \$40 savings from the price quoted in the newspaper.<sup>2</sup> In the letter sent to real estate brokers the attorneys indicated that they would represent broker-referred clients for \$195.<sup>3</sup>

Disciplinary proceedings were instituted by the Joint Bar Association Grievance Committee in February 1978. The petition alleged that the attorneys had violated section 479 of the Judiciary Law<sup>4</sup> and Disciplinary Rule 2-103 (A) of the Code of Professional Responsibility.<sup>5</sup> Harrison and Koffler answered by attacking the statute and rule on first amendment grounds.<sup>6</sup> The New York Supreme Court, Appellate Division, assigned the

1. 70 A.D.2d 252, 420 N.Y.S.2d 560 (1979).

2. For a reproduction of the letter sent to homeowners, see *id.* at 254-55, 420 N.Y.S.2d at 562.

3. For a reproduction of the letter sent to brokers, see *id.*

4. N.Y. JUD. LAW § 479 (McKinney 1968) provides:

It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services, or to make it a business so to solicit or procure such business, retainers or agreements.

5. 29 N.Y. JUD. LAW (McKinney Supp. 1979-1980), Disciplinary Rule [hereinafter cited as 29 N.Y. JUD. LAW, DR.] 2-103 (A) as adopted by the New York State Bar Association provides:

A lawyer shall not solicit employment as a private practitioner of himself or herself, a partner or associate to a person who has not sought advice regarding employment of a lawyer in violation of any statute or court rule. Actions permitted by DR 2-104 and advertising in accordance with DR 2-101 shall not be deemed solicitation in violation of this provision.

Cf. 29 N.Y. JUD. LAW, DR 2-101 (rules of court applicable to advertising and publicity by lawyers); 29 N.Y. JUD. LAW, DR 2-104 (suggestion of need of legal services).

6. The attorneys also asserted that the letters complied with New York's guidelines for advertising by lawyers, and in the alternative, that the letters had been prepared and mailed in good faith reliance upon the attorneys' advertising case of *Bates v. State Bar*, 433 U.S. 350 (1977), which had been handed down in June 1977. 70 A.D.2d at 256, 420 N.Y.S.2d at 563. For a discussion of *Bates*, see notes 21-27 and accompanying text *infra*. The reliance argument was considered in determining a penalty. See note 7 *infra*.

case to a referee who determined that the attorneys had violated the provisions as charged. Confirming the referee's report in a unanimous decision, the appellate court held that the attorneys had exceeded the bounds of permissible commercial speech and that their behavior was constitutionally proscribed.<sup>7</sup>

For over a century and a half of constitutional law in the United States, it was an almost unquestioned assumption that "commercial speech"<sup>8</sup> was outside the scope of first amendment protection.<sup>9</sup> Advertising by certain professionals, including attorneys, was included in this characterization and prohibitions against such advertising consistently withstood constitutional attack.<sup>10</sup>

The United States Supreme Court began a period of silence on the issue after its 1951 decision in *Breard v. Alexandria*.<sup>11</sup> In the 1975 case of

7. The court determined that since the letters apparently had been sent in good faith reliance upon *Bates*, the attorneys should not be disciplined. The court warned, however, that with "[t]he members of the Bar having been put on notice by this opinion of the strictures here laid down, any future violation will necessitate the taking of appropriate disciplinary measures." 70 A.D.2d at 275, 420 N.Y.S.2d at 575.

8. See Comment, *Prior Restraints and Restrictions on Advertising after Virginia Pharmacy Board: The Commercial Speech Doctrine Reformulated*, 43 MO. L. REV. 64, 71-74 (1978) (discussing the definition of "commercial speech"). See generally articles cited note 9 *infra*.

9. The Court consistently had denied first amendment protection in situations in which the speech involved could be characterized as "commercial speech." See, e.g., *Breard v. Alexandria*, 341 U.S. 622, 642-43 (1951); *Valentine v. Christensen*, 316 U.S. 52, 54 (1942). Additionally, the Court had stressed in several decisions that communications to which first amendment protection had been given were not "purely commercial." *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *Thomas v. Collins*, 323 U.S. 516, 533 (1945); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943); *Jamison v. Texas*, 318 U.S. 413, 417 (1943). See generally *Heller, The End of the "Commercial Speech" Exception—Good Riddance or More Headaches for the Courts*, 67 Ky. L.J. 927 (1979); *Jackson & Jeffries, Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); Comment, note 8 *supra*.

10. See *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424 (1963); *Williamson v. Lee Optical*, 348 U.S. 483 (1955); *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608 (1935).

Constitutional considerations aside, the traditional ban on advertising by lawyers originated in early English history. H. DRINKER, *LEGAL ETHICS* 210 (1953). There were no formal rules in the United States against advertising until the Alabama State Bar Association adopted the first Code of Ethics in 1887. ALA. CODE OF ETHICS Rule 16 (1887). The American Bar Association's Code of Professional Responsibility, adopted in 1908, placed greater restrictions on advertising than had been done by the Code of the Alabama Bar. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 27 (1907). See Comment, *Bates & O'Steen v. State Bar of Arizona: From the Court to the Bar to the Consumer*, 9 LOY. CH. L.J. 477, 479 (1978). Since 1969, the ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2, has been the repository for considerations and rules pertaining to advertising. See *Christensen, Advertising by Lawyers*, 1978 UTAH L. REV. 619, 619-21. Canon 2 as adopted in Missouri is found in Mo. SUP. CT. R. 4.

11. 341 U.S. 622 (1951). In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the Court noted that "[s]ince the decision in *Breard* . . . the Court has never denied protection on the ground

*Bigelow v. Virginia*,<sup>12</sup> Justice Blackmun, writing for a majority of seven, said that the state no longer could foreclose first amendment claims by classifying speech as commercial. "Regardless of the particular label asserted by the State—whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation'—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation."<sup>13</sup> The Court concluded, however, that it need not decide "the extent to which constitutional protection is afforded commercial advertising under all circumstances and in the face of all kinds of regulations."<sup>14</sup>

One year later, the doctrine of no protection was laid completely to rest in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>15</sup> with Justice Blackmun again writing for the majority. The Court said that "the notion of unprotected 'commercial speech' all but passed from the scene" following *Bigelow*,<sup>16</sup> and held that "commercial speech" was within the ambit of first amendment protection.<sup>17</sup> Neverthe-

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that the speech in issue was 'commercial speech.' That simplistic approach . . . had come under criticism or was regarded as of doubtful validity by Members of the Court . . ." *Id.* at 759. Cf. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (although the speech involved was characterized as commercial, the ground asserted for upholding an ordinance that prohibited certain newspaper advertisements was that the ordinance imposed constitutionally permissible restrictions, *id.* at 385).

12. 421 U.S. 809 (1975).

13. *Id.* at 826.

14. *Id.* The holding was limited to the facts, which involved the conviction of a newspaper editor for violation of a statute making it a misdemeanor to encourage by the sale or circulation of any publication the procurement of an abortion. The Court held that the statute, as applied to the editor, was an unconstitutional infringement on protected speech. *Id.* at 829.

15. 425 U.S. 748 (1976). In *Virginia Pharmacy*, consumers of prescription drugs challenged the validity of a state statute which prohibited licensed pharmacists from advertising the prices of prescription drugs. The Supreme Court held that the statutory ban could not be justified on the basis of any of the proffered state interests. *Id.* at 750-56. See note 17 *infra*.

16. 425 U.S. at 759.

17. *Id.* at 770. The Court noted that three factors compete with the state's right to regulate commercial speech. First, the advertiser, even though motivated by purely economic factors, is entitled to some first amendment protection. *Id.* at 762. Second, the consumer has an interest in the free flow of commercial information. *Id.* at 763. "If there is a right to advertise, there is a reciprocal right to receive the advertising . . ." *Id.* at 757. See also *Procurier v. Martinez*, 416 U.S. 396, 408-09 (1974); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). Third, the Court found that there was a general public interest in the free flow of commercial information: such information is "indispensable" to a predominately free enterprise system in which economic decisions must be intelligent and well-informed. 425 U.S. at 764-65.

Using a balancing approach to determine the propriety of the regulation, the Court recognized a strong state interest in the maintenance of professionalism among pharmacists. *Id.* at 766. The Court also recognized that the state may establish professional standards for pharmacists. *Id.* at 770. It may not, however, enforce such standards as will result in "keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering." *Id.*

Justice Rehnquist, the lone dissenter in *Virginia Pharmacy*, would have dis-

less, a number of questions remained. What was the scope of the constitutional protection given?<sup>18</sup> What test was to be used to insure that protection?<sup>19</sup> What was the full impact of the *Virginia Pharmacy* rule, which dealt with regulation of pharmacists, on the regulation of other professions?<sup>20</sup>

missed the case for lack of standing. He noted that the statute only prevented pharmacists from publishing the information: consumers who had acquired, consistent with their first amendment right to receive information, knowledge of the prices of prescription drugs from other sources were not prohibited from publishing these data. *Id.* at 782. In sum, Justice Rehnquist found that the plaintiff consumers simply were asserting the right of some third party to publish and that they had no standing to do so. *Id.* at 782-83.

Justice Rehnquist went on to address the merits of the case. Without denying that first amendment considerations might be involved, he said:

There are undoubted difficulties with an effort to draw a bright line between "commercial speech" on the one hand and "protected speech" on the other, and the Court does better to face up to these difficulties than to attempt to hide them under labels. In this case, however, the Court has unfortunately substituted for the wavering line previously thought to exist between commercial speech and protected speech a no more satisfactory line of its own—that between "truthful" commercial speech, on the one hand, and that which is "false and misleading" on the other. The difficulty with this line is not that it wavers, but on the contrary that it is simply too Procrustean to take into account the congeries of factors which I believe could, quite consistently with the First and Fourteenth Amendments, properly influence a legislative decision with respect to commercial advertising.

*Id.* at 787.

18. The Court, having made clear that commercial speech was still subject to some regulation, discussed some permissible restrictions. 425 U.S. at 770-73. First, commercial speech, like other types of speech, is subject to "mere time, place, and manner restrictions." Permissible restrictions are those which are justified without reference to the content of the speech, and which serve a significant government interest while leaving open ample alternative channels for communication. *Id.* at 771. See also *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972); *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Kovacs v. Cooper*, 336 U.S. 77, 85-87 (1949); *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941).

Second, if the commercial speech is false or misleading, it can be prohibited. The Court noted that untruthful speech of any variety never has been protected for its own sake. 425 U.S. at 771. See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *Konigsberg v. State Bar*, 366 U.S. 36, 49 (1961).

Without delineating the effect of the *Virginia Pharmacy* decision on advertising in the broadcast media, the Court noted that there are "special problems" in these areas. 425 U.S. at 773. Arguably, the question of the permissible extent of regulation in these areas will be governed by a different standard. See note 94 *infra*. See generally Comment, note 8 *supra*; Note, *Attorney Advertising Over the Broadcast Media*, 32 VAND. L. REV. 755 (1979).

19. Although the test is unclear, it is evident that a balancing approach was used. Comment, *supra* note 8, at 68; Note, *Commercial Speech: Foreclosing on the Overbreadth Doctrine*, 30 U. FLA. L. REV. 479, 486 (1978).

20. In footnote 25 to the majority opinion, the Court said:

We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety and nature, with the con-

The issue of attorneys' advertising was faced squarely by the Supreme Court in *Bates v. State Bar*.<sup>21</sup> In a five to four decision,<sup>22</sup> Justice Blackmun again took up the pen for the majority. It was held that "advertising by attorneys may not be subjected to blanket suppression."<sup>23</sup> Upon finding an especially strong state interest in the maintenance of professionalism among attorneys, the Court refused to hold that *Virginia Pharmacy* had predetermined the issue, and looked to the particular regulation being challenged to assess its permissibility.<sup>24</sup> After analyzing the state interests advanced in support of a proscription on attorneys' advertising,<sup>25</sup> the Court said, "In sum, we are not persuaded that any of the proffered justifications rise to the level of an acceptable reason for the suppression of all advertising by attorneys."<sup>26</sup> The Court held that the state could not "prevent the publication in a newspaper of . . . truthful

sequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.

425 U.S. at 773 n.25.

In his concurring opinion, Chief Justice Burger emphasized this distinction, reasserting that regulations not allowed elsewhere would be permissible in the area of attorney and physician advertising. *Id.* at 774.

Justice Rehnquist, however, stated that "if the sole limitation on permissible state proscription of advertising is that it may not be false or misleading, surely the difference between pharmacists' advertising and lawyers' and doctors' advertising can be only one of degree and not of kind." *Id.* at 785. Justice Rehnquist's prophecy would be realized in *Bates*, discussed in note 21 *infra*.

21. 433 U.S. 350 (1977). In *Bates*, disciplinary proceedings were instituted by the Arizona State Bar against two attorneys for placing a newspaper advertisement in a Phoenix daily, characterizing their legal fees as being "very reasonable fees," and including a listing of the fees charged for certain services. The Supreme Court of the United States held that the disciplinary rule which prohibited such advertising violated the first amendment. *Id.* at 384-85.

22. Chief Justice Burger, as well as Justices Stewart, Powell, and Rehnquist dissented as to the first amendment holding of the case. *Id.* at 352. The Court also was faced with a challenge to the disciplinary rule on antitrust grounds. All Justices agreed that the state was immune from this challenge. *Id.* at 352, 359-63.

23. *Id.* at 383.

24. After a comprehensive discussion of *Virginia Pharmacy*, the Court said:

We have set out this detailed summary of the *Pharmacy* opinion because the conclusion that Arizona's disciplinary rule is violative of the First Amendment might be said to flow *a fortiori* from it. Like the Virginia statutes, the disciplinary rule serves to inhibit the free flow of commercial information and to keep the public in ignorance. Because of the possibility, however, that the differences among professions might bring different constitutional considerations into play, we specifically reserved judgment as to other professions.

*Id.* at 365.

25. In an attempt to justify its prohibition of advertising by attorneys, the state pointed to six objectionable consequences it asserted would otherwise result: (1) the adverse effect on professionalism, (2) the inherently misleading nature of attorneys' advertising, (3) the adverse effect on the administration of justice, (4) the undesirable economic effects of advertising, (5) the adverse effect of advertising on the quality of services, and (6) the difficulties of enforcement. Each interest was disposed of separately in the Court's analysis. *Id.* at 368-79.

26. *Id.* at 379.

advertisement concerning the availability and terms of routine legal services."<sup>27</sup>

In *Bates*, the Court had drawn a distinction between advertising and in-person solicitation, expressly limiting its holding to the former.<sup>28</sup> The issue of in-person solicitation came before the Court in *Ohralik v. Ohio State Bar Association*.<sup>29</sup> In a unanimous decision authored by Justice Powell, the Court explained that "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the court.'"<sup>30</sup> The Court said it had "not discarded the 'common-sense' distinction between [commercial speech] . . . which occurs in an area traditionally subject to government regulation, and other varieties of speech."<sup>31</sup> Commercial speech is given "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values."<sup>32</sup> Modes of regulation are allowed that might be imper-

27. *Id.* at 384. The Court further explained its limited ruling, stating, "We rule simply that the flow of such information may not be restrained, and we therefore hold the present application of the disciplinary rule against appellants to be violative of the First Amendment." *Id.* The Court expressly excluded from its holding questions concerning advertising claims related to the "quality of legal services." *Id.* at 366. Moreover, the Court noted that the decision might not control questions associated with in-person solicitation of clients in situations that breed undue influence. *Id.* See text accompanying note 28 *infra*.

As it had done in *Virginia Pharmacy* with pharmacists, the Court specifically noted that its opinion did not foreclose regulation of lawyers by the state. Some "clearly permissible" limitations and restrictions were said to include: (1) reasonable restrictions as to mere time, place, and manner; (2) restrictions on false, deceptive, or misleading advertisements; and (3) proscription of advertisements concerning illegal transactions. 433 U.S. at 383-84.

Reiterating another assertion made in *Virginia Pharmacy*, the Court said, "[T]he special problems of advertising on the electronic broadcast media will warrant special consideration." *Id.* at 384. See note 94 *infra*.

See generally Comment, *Constitutional Law—Lawyer Advertising—Freedom of Speech*, 23 N.Y.L. SCH. L. REV. 763 (1978); Note, note 19 *supra*; Note, *The Legal Profession Goes Public: Lawyers' Constitutional Right to Advertise*, 46 U.M.K.C. L. REV. 317 (1977); Note, *Constitutional Law—Commercial Speech—Professional Responsibilities—Lawyer Advertising*, 1978 WIS. L. REV. 297.

28. 433 U.S. at 383-84. See note 27 *supra*.

29. 436 U.S. 447 (1978). In *Ohralik*, the defendant-lawyer called the parents of a young girl who he knew had recently been involved in an automobile accident and suggested that their daughter retain an attorney. He later went to see the injured girl in the hospital and offered to represent her and her friend who also had been in the accident. The lawyer asked each to sign a contract. They resisted at first, but eventually both young women agreed to employ the soliciting lawyer. The attorney subsequently was discharged by both clients, who filed complaints with the Grievance Committee of the County Bar Association. Rejecting the lawyer's first amendment claim, the Ohio courts found that he had violated the state's disciplinary rule on solicitation. The Supreme Court of the United States affirmed. *Id.* at 449-54.

30. *Id.* at 460 (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975)).

31. *Id.* at 455-56.

32. *Id.* at 456.

missible in the realm of noncommercial expression.<sup>33</sup> In conclusion, the Court held that a state can discipline a lawyer involved in in-person solicitation for pecuniary gain<sup>34</sup> under circumstances likely to involve fraud, undue influence, intimidation, overreaching, invasion of privacy, or other forms of vexatious conduct.<sup>35</sup>

In *Koffler*, the New York appellate court, after a comprehensive analysis of the aforementioned cases,<sup>36</sup> determined that the letters written by attorneys Harrison and Koffler were "clear examples of commercial speech, motivated by pecuniary interest and serving no purpose other than ultimately to secure a business transaction."<sup>37</sup> It further concluded that the

33. *Id.* The Court said that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Id.* Explaining the harmful effects of in-person solicitation, the Court said:

Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual. . . . In-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the "availability, nature, and prices" of legal services, . . . it actually may disserve the individual and societal interest, identified in *Bates*, in facilitating "informed and reliable decisionmaking."

*Id.* at 457-58.

34. An exception to the in-person solicitation rules of *Ohralik* is found in its companion case, *In re Primus*, 436 U.S. 412 (1978). With Justice Rehnquist alone dissenting, the Court held that solicitation of prospective clients by non-profit organizations that engage in litigation as "a form of political expression" and "political association" constitutes expressive and associational conduct entitled to first amendment protection, as to which the state may regulate only "with narrow specificity." *Id.* at 422-25. While carefully tailored regulation would be allowed, the protection is greater than that afforded pure commercial speech. It has been concluded that the distinction between *Ohralik* and *Primus* depends solely upon the motive of the soliciting attorney. This approach has been subjected to substantial criticism. See Pulaski, *In-Person Solicitation and the First Amendment: Was Ohralik Wrongly Decided?*, 1979 ARIZ. ST. L.J. 23, 65; Comment, *Benign Solicitation of Clients by Attorneys*, 54 WASH. L. REV. 671 (1979). See generally Slikas, *The Tension Between Legal Solicitation and the First Amendment*, 60 CHI. B. REC. 14 (1978); Note, *Constitutional Law—Attorney Advertising and Solicitation—In the Wake of Bates*, 10 TEX. TECH. L. REV. 166 (1978).

35. 436 U.S. at 459, 462. For more detailed analysis of *Ohralik* and *Primus*, see Pulaski, note 34 *supra*; Slikas, note 34 *supra*; Simet, *Solicitation of Public and Private Litigation Under the First Amendment*, 1978 WASH. U.L.Q. 93; Welch, *Bates, Ohralik, Primus—The First Amendment Challenge to State Regulation of Lawyer Advertising and Solicitation*, 30 BAYLOR L. REV. 585 (1978); Comment, *Lawyer Solicitation: The Effect of Ohralik and Primus*, 13 SUFFOLK U.L. REV. 960 (1979); Note, note 34 *supra*; Comment, note 34 *supra*.

36. 70 A.D.2d at 257-68, 420 N.Y.S.2d at 563-71.

37. *Id.* at 271, 420 N.Y.S.2d at 572. See notes 2 & 3 and accompanying text *supra*.



letters were not a form of advertising, but instead constituted solicitation.<sup>38</sup> The court's rationale was that the letters, addressed to a captive audience, created a situation vulnerable to the same sort of vexatious conduct as that described in *Ohralik*.<sup>39</sup> The court said that a letter "goes far beyond the allowable type of restrained advertising aimed at giving public notice of the availability of legal services which was approved of in *Bates*."<sup>40</sup>

Having characterized the letters as solicitation, the court concluded that such mailings could be proscribed.<sup>41</sup> The influence of *Ohralik* on the court's holding is profound. The court stated that *Ohralik* should not be limited to in-person solicitation, but that it should be read to apply to other forms of solicitation as well.<sup>42</sup>

Most of the post-*Bates* litigation has involved in-person solicitation. Courts almost uniformly have agreed that such behavior can be proscribed by court rule or statute.<sup>43</sup> There does appear, however, to be considerable

38. In distinguishing between advertising and solicitation, the New York court said:

As exemplified by the *Bates* case . . . and as implicitly envisioned by the rules of our court . . . permitted advertising entails a public notice of the availability of legal services at a specified rate for purposes of informing the public and thereby assisting the public in making an informed choice of legal counsel . . . . Soliciting, by contrast, connotes an act of entreaty to obtain a particular business transaction.

70 A.D.2d at 271, 420 N.Y.S.2d at 572-73. The court also quoted *State v. Cusick*, 248 Iowa 1168, 84 N.W.2d 554 (1957), in support of the advertising-solicitation distinction.

39. 70 A.D.2d at 271-74, 420 N.Y.S.2d at 573-74. See note 33 *supra*. The court did not distinguish between the letter sent to homeowners and that sent to real estate brokers. See also 70 A.D.2d at 271-74 n.4, 420 N.Y.S.2d at 573-74 n.4.

40. *Id.* at 272, 420 N.Y.S.2d at 573.

41. *Id.* See text accompanying note 7 *supra*.

42. Citing *Ohralik*, the New York court stated:

Although . . . the court was referring to the specific form of solicitation presented in the case, to wit, *in-person* solicitation, it is clear that solicitation by letter is at least equally "a business transaction in which speech is an essential but subordinate component . . ." This is manifest in the *Ohralik* court's statement . . . that "[a] lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation." The court thus did not limit the lower level of First Amendment protection [of] speech involving "procurement of remunerative employment" to *in-person* solicitation.

70 A.D.2d at 270 n.3, 420 N.Y.S.2d at 572 n.3.

43. These cases generally arise with the constitutional claim being offered as a defense to allegations of unethical conduct. The facts and circumstances of each are generally so close to *Ohralik*, discussed in note 29 *supra*, that the result is treated as essentially predetermined. Cf. *Kitsis v. State Bar*, 23 Cal. 3d 857, 860-63, 592 P.2d 323, 325-27, 153 Cal. Rptr. 836, 838-39 (1979) (disbarment of attorney who hired three lay persons to use police radios, respond to automobile accidents, contact auto body repair shops, hospitals, insurance companies, etc., to solicit professional employment for the attorney); *In re Perrello*, 394 N.E.2d 127, 128-32 (Ind. 1979) (disbarment of attorney who, after approaching persons in the Municipal Courts building and ascertaining their legal problem, advised them they needed an attorney and offered his services); *Chapman & Chapman, Charberes v. Rhoades*, 67 Ill. App. 3d 1037, 1038-40, 385 N.E.2d 723, 723-25 (1978) (where disciplinary action

disagreement whether all types of solicitation can be subject to a per se prohibition.<sup>44</sup>

The advertising-solicitation line likewise has proven difficult to draw. In *Kentucky Bar Association v. Stuart*,<sup>45</sup> the Kentucky Supreme Court reached a different characterization on facts almost identical to those in *Koffler*. Attorneys Stuart and Thompson mailed letters on law office stationery to two real estate agencies. The letters quoted fees for opinions of title, deed preparation, and mortgage preparation.<sup>46</sup> The court said it was "not persuaded that the letters in this case constitute[d] 'in-person solicitation' any more than any other form of advertising. . . . The letters contain no words generally associated with solicitation. . . . None of the evils are present here which exist in the case of 'in-person solicitation.'"<sup>47</sup> The court rejected claims that the letter was more subject to overreaching and deception than was the newspaper advertisement approved in *Bates*,

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was not the essence of the litigation, client made a successful defense to attorney's suit to enforce a contract with the client by asserting that the contract had been solicited by a private investigator for the attorney); *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 419-23, 393 A.2d 1175, 1177-78 (1978) (disciplinary measures imposed on attorneys who, contemplating leaving their law firm and forming their own partnership, contacted their employer's clients by phone, letter, and in-person to solicit the clients' business for their new practice). See also *Hirschkop v. Virginia State Bar*, 604 F.2d 840 (4th Cir. 1979); *In re Arnoff*, 22 Cal. 3d 740, 586 P.2d 960, 150 Cal. Rptr. 479 (1978); *Pace v. State*, 368 So. 2d 340 (Fla. 1979); *Woll v. Kelley*, 80 Mich. App. 721, 265 N.W.2d 23 (1978).

There are apparently no reported decisions evidencing a challenge to the Missouri rule on in-person solicitation. The rule is, however, narrowly drafted in a fashion similar to that of the New York rule, note 5 *supra*. See Mo. SUP. CR. R. 4, DR 2-103(A). It is expected that the rule also would be narrowly interpreted so that Missouri would fall squarely within the mainstream of the above-cited cases in strictly prohibiting in-person solicitation.

44. In *Allison v. Louisiana State Bar Ass'n*, 362 So. 2d 489, 495-96 (La. 1978), the court's response was similar to that of the New York court in *Koffler*: once the activity had been characterized as "solicitation," it summarily was held to be constitutionally prohibited. See text accompanying notes 41 & 42 *supra*. *Accord*, *Pace v. State*, 368 So. 2d 340 (Fla. 1979); *Chapman & Chapman, Charberes v. Rhoades*, 67 Ill. App. 3d 1037, 385 N.E.2d 723 (1978).

A contrary view was expressed in *In re Arnoff*, 22 Cal. 3d 740, 746, 586 P.2d 960, 963, 150 Cal. Rptr. 479, 482 (1978), in which the court wrote that "[s]olicitation by an attorney of professional employment is speech which is protected by the First Amendment." *Accord*, *In re Jacques*, 407 Mich. 26, 281 N.W.2d 469 (1979). See also *Sfikas*, *supra* note 34, at 18-20; Note, *supra* note 34, at 181-82. See generally *Christensen*, note 10 *supra*.

There are apparently no reported decisions in which a challenge has been made to Canon 2 as adopted by the Missouri Supreme Court in Mo. SUP. CR. R. 4. The problem of characterizing speech as advertising or solicitation is not likely to arise until a broader challenge to the rule is attempted. The rule is drafted so that it clearly defines permissible commercial speech by attorneys. A letter, as used in *Koffler*, certainly would fall outside the scope of allowable advertisement. Mo. SUP. CR. R. 4, DR 2-103(A), DR 2-101(B).

45. 568 S.W.2d 933 (Ky. 1978).

46. Compare the letter in *Stuart*, *id.* at 933, with letters in *Koffler*, 70 A.D.2d at 254-55, 420 N.Y.S.2d at 562.

47. 568 S.W.2d at 934.

noting that all forms of advertising are subject to such evils.<sup>48</sup> The court also rejected the claim that ethical standards of advertising would be too difficult to enforce with letters.<sup>49</sup>

The comparison of *Koffler* and *Stuart* exposes the confusion that surrounds efforts to draw an advertising-solicitation distinction.<sup>50</sup> It is the preferred interpretation that this distinction is not warranted.<sup>51</sup> The language of *Ohralik* does not necessarily give rise to such a division of categories.<sup>52</sup> Instead, this language should be read as expressing the principle that, while commercial speech is worthy of first amendment protection, it is to receive less protection than other variations of speech.<sup>53</sup> The facts of *Ohralik* seem to have led courts to construe these comments as unique to *Ohralik* and its factual situation of solicitation, yet the same theme runs vividly throughout *Virginia Pharmacy* and *Bates*, neither of which involved solicitation.<sup>54</sup>

The question then, is what test is to be used by the courts in determining the constitutional permissibility of restrictions upon commercial speech by attorneys. When not faced with solicitation, most courts recognize

48. *Id.*

49. The court suggested that regulation could be accomplished by means of a rule requiring an attorney mailing advertisements to members of the public simultaneously to mail a copy of the letter to the State Bar Association. *Id.*

50. Commentators frequently conclude that this confusion results from the Supreme Court's failure to identify explicitly the guidelines for evaluating the constitutional permissibility of restrictions on attorneys' commercial speech. Note, *supra* note 18, at 756. See generally Van Dusen, *Regulation of Advertising and Solicitation by Lawyers in the United States*, 52 AUSTL. 693 (1978); Walker, *Advertising by Lawyers: Some Pros and Cons*, 55 CHI.-KENT L. REV. 407 (1979); Comment, *Commercial Speech and the Limits of Legal Advertising*, 58 OR. L. REV. 193 (1979).

51. The distinction appears to have arisen from post-*Ohralik* cases which were on all fours with that case. E.g., *Kitsis v. State Bar*, 23 Cal. 3d 857, 592 P.2d 323, 153 Cal. Rptr. 836 (1979); *In re Perrello*, 394 N.E.2d 127 (Ind. 1979); see note 43 *supra*. To deal with the cases swiftly and to avoid relitigation of the constitutional question, the courts have ruled in near-summary fashion that the activity can be proscribed. For example, in *Kitsis*, the court said, "[T]he type of solicitation engaged in by petitioner—contacting victims at the sites of accidents and in hospital rooms—is the specific type *Ohralik* holds may be curtailed by state regulation and discipline." 23 Cal. 3d at 864, 592 P.2d at 327, 153 Cal. Rptr. at 840.

52. Variations of the following statements from *Ohralik* are used by the *Koffler* court, 70 A.D.2d at 271-75, 420 N.Y.S.2d at 572-75, as well as by other courts, to support the advertising-solicitation dichotomy. See cases cited note 44 *supra*.

"In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment, as was held in *Bates* and *Virginia Pharmacy*, it lowers the level of appropriate judicial scrutiny." 436 U.S. at 457. "A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation. . . . While entitled to some constitutional protection, appellant's conduct is subject to regulation in furtherance of important State interests." *Id.* at 459.

53. See text accompanying notes 31-33 *supra*.

54. See Christensen, *supra* note 10, at 628; Van Dusen, *supra* note 50, at 698. But see Sfikas, *supra* note 34, at 18-20; Note, *supra* note 34, at 178, 181-82.

the need to employ some sort of balancing test.<sup>55</sup> As with other first amendment issues, it seems apparent that no per se rule should be adopted<sup>56</sup> in the area of attorneys' advertising, regardless of the advertising-solicitation characterization. The courts instead should begin with a general rule that the first amendment protects all communications, regardless of whether they involve advertising or solicitation.<sup>57</sup> This approach would emphasize the principle that restraint on freedom of speech is the exception, not the rule. Additionally, this approach properly would shift the burden for justification of the restrictions to the state.<sup>58</sup>

After this burden has been shifted to the state, it is incumbent upon the state to make a showing that the purpose of the restraint, whether by judicial rule or statute, is to further some "important state interest."<sup>59</sup> If the state fails on this point, the restriction should be ruled unconstitutional.

If an important state interest is established, the state must show that the activity in question, if not regulated, will lead to the deterioration or destruction of that state interest.<sup>60</sup> In other words, does the regulation of

55. See *People v. Kitsis*, 77 Cal. App. 3d 1, 6, 143 Cal. Rptr. 537, 540 (1977); *Kentucky Bar Ass'n v. Stuart*, 568 S.W.2d 933, 934 (Ky. 1978); *In re Jacques*, 407 Mich. 26, —, 281 N.W.2d 469, 470 (1979); *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 428, 393 A.2d 1175, 1181 (1978); *In re Lacey*, 283 N.W.2d 250, 251 (S.D. 1979).

Commentators generally have agreed. See articles cited note 19 *supra*. See also Van Dusen, *supra* note 50, at 698; Walker, *supra* note 50, at 409; Welch, *supra* note 35, at 592-600; Comment, *Of Shibboleths, Sense and Changing Tradition—Lawyer Advertising*, 61 MARQ. L. REV. 644, 664 (1978); Note, *The Legal Profession Goes Public: Lawyers' Constitutional Right to Advertise*, 46 U.M.K.C. L. REV. 317, 325 (1977); Note, *supra* note 18, at 757-58.

56. See *Elrod v. Burns*, 427 U.S. 347 (1976) (political speech); *Spence v. Washington*, 418 U.S. 405 (1974) (symbolic speech); *Police Dep't v. Mosley*, 408 U.S. 92 (1972) (time, place, and manner restrictions); *United States v. O'Brien*, 391 U.S. 367 (1968) (symbolic speech).

57. The Court made the statement in *Ohralik* that "we . . . have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." 436 U.S. at 456 (emphasis added). See also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 770 ("commercial speech, like other varieties, is protected"); *Bates v. State Bar*, 433 U.S. at 383 ("advertising by attorneys may not be subjected to blanket suppression").

58. Although the Court did not make a precise statement on the allocation of burdens, the burden should not be upon the challenger to show the negative of "no justification." Of course, before the burden would be imposed upon the state, the challenger would have to show that speech activity was involved and that the regulation resulted in a not insignificant infringement on that activity. See *Kentucky Bar Ass'n v. Stuart*, 568 S.W.2d 933, 934 (Ky. 1978).

59. In *Ohralik*, the Court said that "[w]hile entitled to some constitutional protection, appellant's conduct is subject to regulation in furtherance of important state interests." 436 U.S. at 459 (emphasis added).

60. Exactly how strong this connection must be is far from clear. Of course, regardless of the standard used for this connection, the latter will be a factor to consider again in the balancing process. See notes 65-70 and accompanying text *infra*. The basic question can be formulated only in general terms at this point: Does the rule or statute further the important state interest in some significant or substantial way?

the activity actually advance the state interest? If not, the regulation must fall.

The next issue is whether the regulation is reasonable. The "reasonable" standard is to be distinguished from a "necessary" standard, which is a test of indispensability used in other first amendment areas.<sup>61</sup> The lower level of first amendment protection given to commercial speech would not justify such a strict standard.<sup>62</sup> Thus, the state will not lose on this point simply because less restrictive measures are available.<sup>63</sup> In fact, the reasonable standard may require no more than a showing that there are other viable avenues of communication left open.<sup>64</sup>

As with many constitutional issues, it seems that most cases will be decided in a final stage of balancing, in which the court is to determine whether the state interest outweighs the value of the speech activity.<sup>65</sup> The Supreme Court has recognized three important state interests which will justify significant restraint: (1) prevention of vexatious conduct;<sup>66</sup> (2) prevention of the advertisement of illegal transactions;<sup>67</sup> and (3) prevention of false, deceptive, or misleading advertisements.<sup>68</sup> A less tangible but nevertheless important state interest also has been implied: that of prevention of "undue commercialization" of the legal profession or protection of "true professionalism."<sup>69</sup> Even if one of these interests is found, there is no per se rule which would lead to an automatic holding that the restraint on the first amendment freedom is justified. In balancing, a court

61. See *Elrod v. Burns*, 427 U.S. 347 (1976); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *United States v. O'Brien*, 391 U.S. 367 (1968).

62. See text accompanying notes 31-33 *supra*.

63. Because it asserted that less restrictive means could be used to police advertising by letter, *Stuart* could be interpreted as imposing a "necessary" standard. 568 S.W.2d at 934. See note 49 *supra*. Arguably the preferred interpretation, however, is that the court was considering this factor in a final stage of balancing. In other words, since the connection between the regulation and the state interest was found to be attenuated at best, the availability of less restrictive means of regulation tipped the balance in favor of the speech activity.

64. See *In re Primus*, 436 U.S. at 438; *Bates v. State Bar*, 433 U.S. at 384; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 771; *In re Koffler*, 70 A.D.2d at 274, 420 N.Y.S.2d at 574.

65. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 460-62; *Bates v. State Bar*, 433 U.S. at 368-79; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 766-70; *Spence v. Washington*, 418 U.S. 405 (1974) (application of straight or final balancing approach in a symbolic speech case); cases and articles cited notes 55 & 56 *supra*.

66. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 462.

67. *Bates v. State Bar*, 433 U.S. at 384.

68. *Id.* at 383.

69. *In re Primus*, 436 U.S. at 436-37 (Court implied that prevention of "undue commercialization" is an important state interest, while holding that it did not justify regulation under the facts of the case at hand because of the political expression and political association involved). See note 34 *supra*. *Bates v. State Bar*, 433 U.S. at 368-69 (Court implied that protecting "true professionalism" is an important state interest, while holding that, under the facts of the case, there was no undermining of that interest). See note 21 *supra*. See also *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 460.

must look at numerous factors, including the degree to which the undesirable effect will occur without the regulation, the extent to which this effect can be reduced by the regulation, the extent to which the effect could be controlled by less restrictive means, the feasibility of enforcing less restrictive means, the extent to which the free flow of information as a whole will be reduced, and the value of the information to the public.<sup>70</sup>

Clearly the letters distributed by the attorneys in *Koffler*<sup>71</sup> and *Stuart*<sup>72</sup> are a type of commercial speech activity.<sup>73</sup> The complete prohibition of such activity by the challenged statute and rule is a significant infringement in this first amendment area.<sup>74</sup> Consequently, the state has the burden of justification<sup>75</sup> by showing that the regulation is designed to further some important state interest.<sup>76</sup>

Possibilities of vexatious conduct<sup>77</sup> primarily are confined to invasion of privacy and overreaching. Arguably, however, the receipt of a letter is not an invasion of privacy. Letters are no more than a slight inconvenience and can be discarded at will. Overreaching, if present at all, is minimal. While the letter may exert some pressure, it does not demand an immediate response. There is ample opportunity for reflection and comparison. While a state bar association may not intervene or counter-educate the recipient of a particular letter without further authorization for regulation,<sup>78</sup> it could use mailings to inform the public generally of the availability of legal services. Unless letters are sent repeatedly to harass particular individuals, it is a reasonable conclusion that there is no significant connection between the prevention of vexatious conduct and the proscription of advertising by letter.<sup>79</sup>

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70. This list, while not exhaustive, does reflect the major considerations of the Court in the attorneys' advertising cases.

71. See text accompanying notes 2 & 3 *supra*.

72. See text accompanying note 46 *supra*.

73. The court in each case made a clear finding on this point. 70 A.D.2d at 271, 420 N.Y.S.2d at 572; 568 S.W.2d at 934.

74. The New York statute and rule are set out in notes 4 & 5 *supra*. The Kentucky court was applying the ABA version of DR 2-103(A), which is very similar to the New York version, and which reads: "A lawyer shall not recommend employment as a private practitioner, of himself, his partner, or associate to a nonlawyer who has not sought his advice regarding employment of a lawyer." The ABA is presently redrafting the CODE OF PROFESSIONAL RESPONSIBILITY. A discussion draft by the Evaluation Commission was issued January 30, 1980. There do not appear to be any profound changes in the Commission's approach to advertising and solicitation. See Discussion Draft for ABA Model Rules of Professional Conduct Rule 9 (Jan. 30, 1980).

75. See note 58 and accompanying text *supra*.

76. See note 59 and accompanying text *supra*. See also notes 65-69 and accompanying text *supra*.

77. See note 66 and accompanying text *supra*.

78. In *Stuart*, the court proposed a plan for intervention by the State Bar Association which would impose further requirements for compliance on an attorney wishing to send out mailings. 568 S.W.2d at 934. See note 49 *supra*.

79. This is contrary to the reasoning of *Koffler*, in which the court relied heavily on the idea that sending letters was "solicitation" and therefore involved

The state could argue successfully, however, that a significant connection exists between the prevention of false, deceptive, or misleading advertisement<sup>80</sup> and the prohibition of advertising by letter. Because most forms of advertising are susceptible to such abuse, the complete prohibition of such mailings would advance this state interest.

Whether there is a significant connection between the prevention of undue commercialization<sup>81</sup> and the prevention of advertising by letter is a very close question. Unsolicited mailings often are sent by other professionals to various groups of the general public. Nevertheless, the content of any particular letter could reflect negatively on the integrity of the sender. Analysis should proceed with a finding that a significant connection exists and that the prohibition would further a state interest in maintaining professionalism among attorneys.

Having established a significant connection between two important state interests and the activity to be regulated, the state must show that the regulation is reasonable.<sup>82</sup> Because both New York and Kentucky allow attorneys to advertise by newspaper,<sup>83</sup> other avenues of communication are left open. A letter would not open up communication to a significantly greater number of individuals.<sup>84</sup> A fortiori, the regulation is reasonable.<sup>85</sup>

Analysis of *Koffler* and *Stuart* proceeds to the final stage of balancing. The following considerations are necessary.<sup>86</sup> (1) The degree to which the undesirable effect will occur without the regulation: the connection between undue commercialization and advertising by letter is tenuous at best.<sup>87</sup> The possibility of deception is much more realistic. If this regulation is removed, there will be no restraint on the activity other than that imposed by general ethical considerations.<sup>88</sup> (2) The extent to which this effect can be reduced by regulation: clearly a complete prohibition as was imposed in both New York and Kentucky<sup>89</sup> will eliminate the adverse effects of mailings. (3) The extent to which the effect could be controlled

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the same type of vexatious conduct found with in-person solicitation in *Ohralik*, 70 A.D.2d at 271-72, 420 N.Y.S.2d at 573. See notes 38-40 and accompanying text *supra*.

80. See note 68 and accompanying text *supra*.

81. See note 69 and accompanying text *supra*.

82. See notes 61-64 and accompanying text *supra*.

83. 70 A.D.2d at 271, 420 N.Y.S.2d at 572-73; 568 S.W.2d at 934.

84. In a society in which many are not well-read and many are illiterate, advertising over the broadcast media would have a more profound effect in opening up new avenues of communication. See generally Note, *Attorney Advertising Over the Broadcast Media*, 32 VAND. L. REV. 755 (1979).

85. The Court may elaborate on this requirement in the future, so that the availability of less restrictive means is evaluated. Under the existing decisions, however, no such analysis is warranted and consideration of less restrictive means is more appropriate in the final stage of balancing. See notes 61-63 and accompanying text *supra*.

86. See notes 65-70 and accompanying text *supra*.

87. See text accompanying note 81 *supra*.

88. E.g., ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canons 1 & 9.

89. See notes 4-5 & 74 *supra*.

by less restrictive means: other means which infringe less on the speech activity exist; *e.g.*, guidelines as to what information could be in the letter, a reference in the letter to a neutral source of information, or a requirement that a copy of each letter be sent to a supervising agency. (4) The feasibility of enforcing less restrictive means: while enforcement is possible,<sup>90</sup> the additional resources necessary for supervision by less restrictive means results in this factor favoring regulation. (5) The extent to which the free flow of information as a whole will be reduced: while any restraint on advertising reduces the free flow of information, the reduction here is not great. Both New York and Kentucky provide for advertising in the print media. The additional population reached by letter would not be great.<sup>91</sup> (6) The value of the information to the public: the type of information which can be conveyed by letter is the same as in *Bates*.<sup>92</sup> The value of this information in assisting the public in making informed decisions is great.

In sum, the weak connection between advertising by mail and the state interest in the prevention of undue commercialization of the legal profession seems to preclude the balance from weighing in favor of the state. But, the state interest in preventing false, deceptive, and misleading advertising does justify prohibition. While the value of the information is great, it can be communicated through other available channels. As stated, less restrictive means of regulation would be available. The test does not require, however, choosing the least restrictive alternative. The regulation here is reasonable. The totality of the final stage of balancing weighs in favor of the constitutionality of the proscription on advertising by direct mailings to identified individuals.<sup>93</sup>

Conflicting state court decisions exist concerning other important forms of attorney advertising.<sup>94</sup> There is still considerable doubt as to the constitutionality of certain rules and statutes regulating advertising.<sup>95</sup> What seems to be lacking is a detailed analysis of the constitutional questions

90. See note 49 *supra*.

91. See notes 83 & 84 and accompanying text *supra*.

92. See note 21 *supra*.

93. In result, although not in approach, the test is consistent with the conclusion of the New York court in *Koffler*, but not with the result reached by the Kentucky court in *Stuart*. See notes 7 & 47 and accompanying text *supra*.

94. State courts are divided on the permissibility of attorneys' advertising in the broadcast media. Note, *supra* note 18, at 776. Compare Mo. SUP. CT. R. 4, DR 2-101 (advertising in the electronic media not permitted) with ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101 (advertising in the broadcast media is permitted). See also *In re* Petition for Rule of Court Governing Lawyer Advertising, 564 S.W.2d 638, 643 (Tenn. 1978) (court held advertising must be allowed in the electronic media). See generally Note, *supra* note 18, at 767-73 (arguments for and against allowing this type of advertising).

95. *E.g.*, the advertising and solicitation rules in Mo. SUP. CT. R. 4 are presently being challenged in the United States District Court for the Western District of Missouri. Clearly the Missouri provisions in Canon 2 are much more narrowly drawn than those in the ABA CODE OF PROFESSIONAL RESPONSIBILITY. See, *e.g.*, note 94 *supra*. This type of variance among the rules of different jurisdictions is not uncommon.



involved. The states cannot give cursory treatment to these issues: commercial speech is protected by the first amendment. While this protection may be less than that given to other varieties of speech, the protection is something that each state must insure when forming and evaluating its regulations on attorneys' advertising.

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